Supreme Court, U.S.
FILED
JUL 22 1998
OFFICE OF THE CLERK

No. 97-2060

In The

Supreme Court of the United States

October Term, 1997

EUGENE H. GADDIS,

Petitioner,

vs.

SHARON H. GADDIS,

Respondent.

On Petition for Writ of Certiorari to the State of Arizona Court of Appeals, Division Two

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF JURISDICTION

Rule 10(c), Rules of the Supreme Court of the United States, provides, in pertinent part, that this Court has discretion to grant review on a writ of certiorari if a state court ". . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Petitioner claims that the Opinion issued by the Arizona Court of Appeals, Division Two, on August 14, 1997, conflicts with the requirements of Title 10 U.S.C. § 1408 and the holding in *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989) construing these requirements. For the reasons stated in the Argument contained in this Opposition, it is Respondent's position that no conflict exists between the relevant decisions of this Court as set forth in *Mansell* and the decision of the Arizona Court of Appeals. Therefore this Court lacks jurisdiction to consider the Petition for a Writ of Certiorari in this matter.

STATEMENT OF THE CASE

Petitioner's Statement of the case contained in his Petition for a Writ of Certiorari is incomplete and therefore misleading. The following facts and procedural history are relevant to the Court's consideration of the Petition.

1. The parties' marriage of twenty-eight years duration was dissolved in April of 1993 pursuant to a Decree of Dissolution of Marriage entered by the Superior Court of the State of Arizona in and for Pima County.

2. From the date of the parties' marriage until his retirement in April of 1992, Petitioner was a member of the United States Air Force.

3. The Decree of Dissolution of Marriage provided that Respondent waived any rights to Petitioner's military retirement pay.

4. Respondent later moved to set aside the Decree as to this provision, and following a hearing on the matter, the trial court entered judgment in November 1994 awarding her one-half of Petitioner's military retirement benefits as of February 1994. Petitioner appealed the award, and the Arizona Court of Appeals, Division Two affirmed the award in *Gaddis v. Gaddis*, 2 CA-CV 94-0337 (memorandum decision filed March 31, 1995).

5. Subsequent to the issuance of the memorandum decision, the trial court in December of 1995 issued a qualified domestic relations order implementing the judgment entered in November of 1994.

6. In October of 1995, almost one year following the entry of the November 1994 judgment regarding division of the military retirement benefit, Petitioner obtained civil service employment with the federal government. Petitioner's monthly military retirement benefit payment was reduced as a result of the "dual compensation offset" required by 5 U.S.C. § 5532(b), and Petitioner then unilaterally reduced his monthly payment to Petitioner from approximately $750 to approximately $340.

7. Respondent then petitioned the trial court for relief, claiming that her share of Petitioner's retirement should not be reduced. Following a hearing on the matter, the trial court found in its Order issued April 24, 1996, that the "dual compensation offset" as applied to Petitioner's military retirement pay did not reduce the amount that Petitioner was required to pay Respondent monthly for her share of his military retirement benefit. On appeal, the Arizona Court of Appeals, Division Two, affirmed the trail court's decision in this matter.

REASON FOR DENYING THE WRIT

Respondent Sharon H. Gaddis, by and through her counsel undersigned, respectfully requests that the Supreme Court of the United States deny Petitioner's Petition for a Writ of Certiorari to the State of Arizona Court of Appeals, Division Two. The Arizona Court of Appeals, Division Two, was correct in finding in its August 14, 1997 Opinion, that the trial court's order of April 24, 1996, did not conflict with federal law.

The Arizona court, like courts in other community property states, is authorized to divide "disposable retired pay" as community property in divorce actions, pursuant to the provisions of the Uniformed Services Former Spouses' Protection Act (the Act), 10 U.S.C. § 1408(c). This Court, however, has construed the Act as requiring that ". . . a military retiree must waive an amount of his or her retirement pay equal to the amount he or she receives in disability benefits." *Mansell v. Mansell*, 490 U.S. 581, 584, 109 S. Ct., 2023, 2026, 104 L. Ed. 2d 675 (1989). In *Mansell*, this Court held that the Act "does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." 490 U.S. at 594-95, 109 S. Ct. at 2032, 104 L. Ed. 2d 678. The *Mansell* Court observed that the Act's grant of authority to state courts to divide military retirement pay "is both precise and limited." On this basis, this Court found that the Act expressly excludes amounts waived to receive disability benefits from the definition of "disposable retired pay." *Id.* at 588, 109 S. Ct. at 2028, 104 L. Ed. 2d 677. Moreover, the section of the Act addressed in *Mansell*, 10 U.S.C. § 1408(a)(4)(B), also excludes from the definition of "disposable retired pay" amounts waived to receive civil service compensation under Title 5, U.S.C. *Id.*

Petitioner relies on § 1408 and *Mansell* to contend that Respondent's community interest in his retirement benefits should, as a matter of law, be reduced by the amount he waived in order to receive civil service compensation. Petitioner ignores, however, the fact that the waiver occurred well after the final dissolution decree was entered. Petitioner's contention is not supported either by applicable federal law or state law. For this reason, the Arizona Court of Appeals, Division Two, was correct in rejecting Petitioner's argument and affirming the trial court's disposition of Petitioner's military retirement pay.

An Arizona "[d]ecree of dissolution of marriage . . . is final when entered, subject to the right of appeal." *Arizona Revised Statutes* § 25-325. The terms of a decree "as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state." A.R.S. § 25-327(A). The trial court found that there was justification for reopening the judgment and did so for the purpose of allocating Respondent her interest in Petitioner's military retirement pay. The trial court declined to modify the decree in this case further by reducing Respondent's community property interest in Petitioner's retirement pay due to a post-decree change in circumstances unilaterally effected by Petitioner. The trial court's decision is consistent with the principles underlying the relevant statute and with Arizona case law construing it. For example, the Arizona court generally has not allowed a former spouse "to transform retirement benefits constituting community property to [other, non-retirement] benefits constituting separate property," once a final decree has been entered. *McNeel v. McNeel*, 169 Ariz. 213, 215, 818 P.2d 198, 200 (App. 1991).

The trial court's decision in this regard also is consistent with the requirements of both the Act and *Mansell*. The Act does not require or even suggest that a court's final award of a

community property interest in retirement pay must be altered when the military retiree obtains civil service employment after the decree has been entered. It is true that the Act precludes a state court from dividing retirement pay waived pursuant to the dual compensation offset. In this case, the trial court in the 1994 determined the dollar amount of the community property interest in husband's military retirement pay as of February 1994 and awarded Respondent her one-half of those benefits. In February of 1994 there was no dual compensation offset in effect because Petitioner had not yet obtained civil service employment. When Petitioner did obtain civil service employment, the court already had determined Respondent's fixed interest in the military retirement pay and awarded it to her. Petitioner then unilaterally obtained civil service employment, and used that employment to attempt to subvert the terms of the decree by voluntarily waiving a portion of the retirement that the court had awarded to Respondent. The Arizona court has consistently found that such unilateral post-decree action cannot be exploited to reduce an award to a former spouse. *Beltran v. Razo*, 163 Ariz. 505, 507, 788 P.2d 1256, 1258 (App. 1990). Moreover, this case differs in its facts from *Mansell*. In *Mansell*, the lower court had awarded the wife a community property interest in the portion of retirement pay the husband already had waived to receive disability benefits. Therefore, in *Mansell*, the lower court's action was inconsistent with the requirements of 10 U.S.C. §§ 1408(a)(4)(B) and 1408(c). *Id.* at 585-86, 109 S. Ct. at 2027.

The Supreme Court has acknowledged that "domestic relations are preeminently matters of state law," and there is no federal preemption absent evidence that it is "positively required by direct enactment." 490 U.S. at 587, 109 S. Ct. at 2028, quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581, 99 S. Ct. 802, 808, 59 L. Ed. 2d 1 (1979) (quoting *Wetmore v. Markow*, 196 U.S. 68, 77, 25 S. Ct. 172, 176, 49 L. Ed. 390

(1904)). This Court in *Mansell* does not address a post-decree change in circumstances. Thus *Mansell* contains no positive requirement for direct enactment with regard to such post-decree changes. The decision of the Arizona Court of Appeals, Division Two, in declining to alter the trial court's property allocation in the final divorce decree due to changes that occurred when Petitioner obtained civil service employment after the decree had been entered, is consistent with the requirements of federal law, as set forth in the Act and in *Mansell.*

CONCLUSION

For all of the foregoing reasons, this Court should deny Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

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